Filed 10/5/10 P. v. Henderson CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW HENDERSON et al., Defendants and Appellants.	D054493 (Super. Ct. No. SCD206291)

APPEAL from judgments of the Superior Court of San Diego County, Cynthia Bashant, Judge. Judgment affirmed in part, reversed in part as to Montgomery; judgment affirmed as to Henderson.

A jury convicted Travis Montgomery of conspiracy to rob and robbery of the Skyline Farms Market (counts 3, 4), conspiracy to rob and attempted robbery of the Eastridge Liquor Store (counts 5, 6), and possession of a firearm by a felon (count 7). The same jury convicted Matthew Henderson of counts 5 and 6. Montgomery and Henderson jointly assert the trial court abused its discretion by granting the prosecution's

motion to consolidate the charges against them and another codefendant. Montgomery also challenges: (1) the sufficiency of the evidence supporting his convictions; (2) the trial court's use of prior juvenile court adjudications as prior strike convictions; and (3) the trial court's denial of his motion to dismiss a prior strike conviction under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

We reject the joint assertion that the trial court abused its discretion when it consolidated the charges and affirm the judgment against Henderson. We conclude there is insufficient evidence to support Montgomery's convictions for conspiracy to rob and robbery of Skyline Farms Market (counts 3, 4), and reverse Montgomery's judgment as to these counts. We reject Montgomery's remaining contentions and affirm the balance of the judgment against him.

FACTUAL AND PROCEDURAL BACKGROUND

The charges in this case arose out of a wiretap investigation of a San Diego street gang, the Lincoln Park Bloods, by a gang task force. FBI Agent Gregory Houska was the lead investigator for the task force. The wiretaps targeted a number of gang members including Carl Rouse and Montgomery. The wiretap investigation uncovered crimes committed by these men with fellow gang members Richard Wright and Henderson. Montgomery and Henderson were low-ranking members of the gang, and Rouse and Wright held an equal higher-ranking status.

Specifically, investigators learned of a plan by Rouse and Wright to rob purported drug dealers, Ramona Laday and Tyrece Claybourne. Ultimately, both plans fell through.

They also learned about a conspiracy by Rouse and Wright to rob Eastridge Liquor Store using Montgomery and Henderson as the robbers.

On February 16, 2005, the evening of the planned Eastridge Liquor Store robbery, task force members followed cars driven by Rouse and Wright, with Montgomery and Henderson as passengers. (All further dates are in 2005.) After several telephone calls and a meeting, the men abandoned the plan because they believed they were being watched. Task force members stopped the car containing Rouse and Wright, and arrested the men. The task force also followed a Cadillac carrying Montgomery and Henderson. They arrested Henderson, but Montgomery escaped. Police recovered from the front seat of the Cadillac a black and red sports bag containing robbery materials, including: a ski mask; gloves; duct tape; and two guns. Finally, through further investigation, the task force learned about an earlier robbery at Skyline Farms Market on February 12 involving Rouse, Montgomery and Henderson.

The prosecution initially charged the crimes relating to Skyline Farms Market, separate from the crimes involving Laday, Claybourne and Eastridge Liquor Store. It later moved to consolidate the cases. Rouse and Henderson filed written opposition to the motion, but Montgomery did not. Montgomery, who was self-represented at the time, indicated to the court during argument on the motion that he was in "over his head" and had nothing to add. The trial court granted the motion.

Thereafter, the People filed a consolidated information containing seven counts. Rouse was charged on all counts, including the conspiracies to rob Laday (count 1) and Claybourne (count 2). Montgomery and Henderson were charged with conspiracy to rob

and robbery relating to the Skyline Farms Market robbery (counts 3, 4), and conspiracy to rob and attempted robbery of Eastridge Liquor Store (counts 5, 6). Finally, Montgomery was charged with possession of a firearm by a felon relating to the attempted robbery of Eastridge Liquor Store (count 7). The information also contained certain enhancements against all defendants, and alleged that Montgomery suffered two prior juvenile adjudications. Henderson pleaded guilty to the attempted robbery of Eastridge Liquor Store, and the trial court excluded evidence of the plea at trial.

The trial court jointly tried the three men before a single jury. Wright testified at trial for the prosecution in exchange for a 20-year determinate sentence. The jury found the men guilty as charged on all counts and found true the enhancement allegations, and Montgomery's prior juvenile adjudications. The trial court sentenced Henderson to an aggregate sentence of 15 years in prison. The trial court denied Montgomery's motion to dismiss a prior strike allegation and sentenced him to a total of 50 years to life plus 11 years, consisting of: 25 years to life on counts 3 and 5, consecutive; 10 years consecutive on the firearm enhancement; and 1 year consecutive for being armed with a firearm. Defendants timely appealed.

DISCUSSION

I. *Joint Contention – Consolidation*

Charges may be consolidated under two circumstances: (1) when they are connected together in their commission; or (2) when they are of the same class of crimes. (Pen. Code, § 954; *People v. Soper* (2009) 45 Cal.4th 759, 771.) (Undesignated statutory references are to the Penal Code.) If the statutory requirements for joinder are met, a

defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in granting consolidation. (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.) In determining whether there was an abuse of discretion in a noncapital case, we examine the record before the trial court at the time of its ruling and consider: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; and (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges. (*Id.* at p. 161.) "[A] determination of prejudice is a highly individualized exercise, necessarily dependent upon the particular circumstances of each individual case." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 452, superseded by statute on another ground in *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1229, fn. 19.)

Montgomery and Henderson impliedly conceded that the statutory requirements for joinder were satisfied by not arguing this point. Rather, they assert that the consolidation of the conspiracy charges relating to Laday, Claybourne and Eastridge Liquor Store with the completed robbery of Skyline Farms Market deprived them of their due process right to a fair trial.

As a threshold matter, the Attorney General argues that Montgomery forfeited the issue by failing to file written opposition to the consolidation motion, join in the opposition filed by Rouse and Henderson, or argue against consolidation at the hearing. Montgomery concedes these contentions, but asserts that subsequently appointed counsel preserved the issue by seeking to sever the counts relating to his codefendants before

trial. Although Montgomery's appointed counsel moved in limine to exclude evidence of the codefendants' crimes under Evidence Code section 352, the motion did not seek severance of Montgomery's charges from those of his codefendants. Accordingly, by failing to argue against consolidation below, Montgomery forfeited the issue on appeal. (*People v. Maury* (2003) 30 Cal.4th 342, 392 [§ 954 imposes no sua sponte duty to sever on trial courts, and the failure to move for severance waives the issue on appeal].) In any event, as discussed below as to Henderson, the trial court did not err in consolidating the charges.

As we explained, Henderson pleaded guilty to the attempted robbery of Eastridge Liquor Store, and the trial court excluded evidence of the plea at trial. He asserts that joining the conspiracies to rob Laday and Claybourne exposed the jury to numerous telephone calls between Wright and Rouse discussing uncharged gang-related activity that would not have been admissible in a trial solely addressed to the Skyline Farms Market robbery. We disagree.

First, we reject Henderson's contention that many of the telephone calls between Wright and Rouse discussing Laday and Claybourne might not have been admissible absent consolidation. This argument ignores that much of the gang-related evidence heard by the jury would have been admissible in a trial solely addressed to the Skyline Farms Market robbery based on the gang enhancements attached to these counts. In any event, Henderson has not shown how the evidence relating to the Laday and Claybourne conspiracies was more inflammatory than what the jury would have heard absent consolidation. Moreover, Henderson was never linked to the Laday and Claybourne

conspiracies, and the trial court instructed the jury that each count charged a distinct crime that jurors needed to decide separately.

This matter did not involve consolidating a strong case with a weak one to improve the likelihood of conviction. Henderson did not challenge the sufficiency of the evidence supporting the Skyline Farms Market robbery, possibly because Wright's testimony regarding Henderson's involvement was sufficiently corroborated by an earlier identification by the clerk at Skyline Farms Market naming Henderson as one of the robbers with 90 percent certainty. The clerk's later trial testimony where he was unable to remember the race of the robbers was not before the trial court at the time of its ruling on the motion to consolidate. (*People v. Balderas* (1985) 41 Cal.3d 144, 171 [exercise of discretion is reviewed based on the record before the trial court at the time the motion was made, not based on the evidence presented at trial].) Finally, the consolidated offenses were factually separable; thus, there was a minimal risk of confusing the jury. (*People v. Mendoza, supra,* 24 Cal.4th at p. 163.)

Henderson has failed to meet his burden of showing prejudice to establish that the trial court abused its discretion in granting consolidation. (*People v. Mendoza, supra*, 24 Cal.4th at p. 160.) Additionally, we conclude there is nothing about this consolidation that violated Henderson's state or federal constitutional rights. (See *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 [improper joinder does not in itself violate the Constitution; this occurs only if the error is so great that it denies a defendant the Fifth Amendment right to a fair trial].)

II. *Montgomery's Appeal*

A. Sufficiency of the Evidence

1. Legal Principles

A conviction cannot be based only on accomplice testimony. (§ 1111.) There must be sufficient corroborating evidence that "shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (*Ibid*.) The requisite corroboration "must, without aid from the accomplice's testimony, connect the defendant to the charged offense, but may be circumstantial, slight and entitled to little consideration when standing alone. [Citations.] Corroborating evidence need not be sufficient to establish the defendant's guilt or corroborate the accomplice to every fact to which the accomplice testified. [Citations.] It must raise more than a suspicion or conjecture of guilt, and is sufficient if it connects the defendant with the crime in such a way as to reasonably satisfy the trier of fact as to the truthfulness of the accomplice. [Citations.]" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1177-1178.) Unless we determine "that the corroborating evidence should not have been admitted or that it could not reasonably tend to connect a defendant with the commission of a crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal. [Citations.]" (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.)

When a defendant challenges the sufficiency of the evidence to support his conviction, we examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which the jury could find the

defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576, 578.) We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict," we will not reverse. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) The same standard of review applies even "when the conviction rests primarily on circumstantial evidence . . . ." (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1053.)

2. Skyline Farms Market (Counts 3, 4)

a. Evidence

Wright testified at trial that in the beginning of February he contacted Rouse about the possibility of robbing Skyline Farms Market. Around this time Wright met Henderson, learned his gang affiliation with Lincoln Park, and decided to build a relationship with him. Wright believed that Henderson would want to "put[] in work" to gain the respect of the gang by engaging in activities such as robberies. Wright also knew of Montgomery, and asked other people about Montgomery's background.

Wright claimed that he and Rouse had planned to rob Skyline Farms Market themselves, but they abandoned the plan after the owner saw them and their vehicle. They left the store and decided to get others to commit the robbery. Rouse contacted Montgomery, and Wright contacted Henderson about the opportunity. After both men agreed to do the "lick" or robbery, Montgomery obtained a car to use and Wright notified Rouse on February 12, the morning of the robbery, that the plan would go forward.

On February 12, Wright picked up Henderson and then met Montgomery at a specified location about 50 yards from the store. Wright gave the men a black and red sports bag containing a ski mask, gloves, duct tape and two guns. Wright then parked his car where he could watch the store front. Wright observed the men go inside and jog out a couple of minutes later. Wright followed the men as they drove away. Eventually, Wright called Montgomery telling him where to meet. At the meeting, Henderson and Montgomery returned the sports bag that now contained about $1,200 in cash, and described how one of the men had hit the store clerk with a pistol.

The prosecution used a number of telephone calls recorded by the task force on February 11 and 12 as evidence to corroborate Wright's testimony. On February 11 at about 8:00 p.m., Montgomery told Rouse that he "got one of my niggas" and wanted to know whether the gig was "still a go." Rouse stated that the "gig" was "still a go," with Montgomery replying that he would be there in a minute. The following day, at about 9:00 a.m., Rouse and Wright spoke during two telephone calls. Wright complained to Rouse that "there really ain't no loot," and told him that they collected about $1,200, and this was a "refresher course for him." The two men talked about others getting "juiced" and that everything went "accordingly." About one-half hour later, Wright called Rouse to tell him that they collected "like a stack and a half" and wanted to know how to "divvy it." Rouse asked Wright whether "They lookin' like they, they want some," with Wright replying that they did. Rouse stated that they should get "two" and that they know the "the next one will be more giggin." At trial, Agent Houska explained that about $1,500

had been collected ("like a stack and a half"), that the participants would get about $200 each ("two"), and that the men expected the next robbery to be better ("giggin").

The store clerk and co-owner of Skyline Farms Market, Farad Makou, testified that on the morning of February 12 at about 8:00 a.m., he was counting money when two men came inside the store. One man wore a hooded jacket, and the other man wore a mask and held a gun. One man asked Makou for money, and then hit him with the gun. The men took an unknown amount of cash and left the store. Makou identified Henderson from a photographic lineup as the robber that did not wear a mask. At the time, Makou was about 90 percent certain of the identification.

Montgomery denied planning or committing the Skyline Farms Market robbery and claimed that he was not in a vehicle with Wright or anyone else on the day of the robbery. Montgomery testified that on February 11, he and Henderson had been downtown selling drugs until Wright picked them up the following morning sometime after 5:00 a.m. Montgomery claimed that he had been nowhere near the area when the Skyline Farms Market robbery occurred a few hours later.

A criminalist for the San Diego County Sheriff's Crime Lab testified that the gun recovered from the Cadillac after the attempted Eastridge Liquor Store robbery contained Makou's blood. Another gun swab revealed a mixture of DNA from four individuals. A possible contributor to the DNA included Wright, but excluded Rouse, Montgomery and Makou.

b. Analysis

Montgomery does not dispute that Skyline Farms Market was robbed on February 12; rather, he contends there was insufficient evidence to corroborate Wright's testimony that he was one of the robbers. He also asserts the evidence did not support his conviction for conspiring to rob Skyline Farms Market. The Attorney General addressed these counts in two paragraphs, arguing that Wright's testimony proved every element of both crimes. Even assuming the truth of this argument, the Attorney General ignored the requirement that Montgomery's convictions cannot be based solely on Wright's testimony. (§ 1111.) Although the Attorney General acknowledged the need for corroborating evidence elsewhere in his brief, he generally cited other evidence without citations to the record or any analysis explaining how the cited evidence corroborated Wright's testimony as to each count. Accordingly, we searched the record for corroborating evidence.

To establish Montgomery's culpability for conspiracy to rob Skyline Farms Market, the prosecution was required to show Montgomery's express or implicit agreement to commit the robbery, his intent to commit the robbery, and at least one overt act committed by a coconspirator towards its commission. (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) Conspiracy may be, and generally is, proven circumstantially. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464.) The overt acts charged as part of the conspiracy can be circumstantial evidence of the conspiracy's existence and may establish the conspiracy's purpose and intent. (*Ibid.*) The existence of a conspiracy may also be "inferred from the conduct, relationship, interests, and activities of the alleged

conspirators before and during the alleged conspiracy. [Citations.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135, quoting *People v. Cooks* (1983) 141 Cal.App.3d 224, 311.) Significantly, "the independent proof required to establish the existence of a conspiracy may consist of uncorroborated accomplice testimony. [Citations.]" (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1135.)

Wright's testimony established the existence of a conspiracy to rob Skyline Farms Market. Although Wright also testified that Montgomery and Henderson robbed Skyline Farms Market, we must eliminate this testimony from the case, and examine the other evidence to determine if there is any inculpatory evidence tending to connect Montgomery to the conspiracy and the robbery. (*People v. Falconer*, *supra*, 201 Cal.App.3d at p. 1543.) We conclude there is insufficient corroborating evidence to support these convictions.

The prosecution's gang expert testified that gangs have hierarchies, and that gang members increase their ranking by "putting in work" for the gang by committing crimes such as robberies and bringing the money back to the gang. Montgomery admitted he was a Lincoln Park gang member and that he knew Rouse, Wright and Henderson. Montgomery's association with the other men, and his participation in the attempted Eastridge Liquor Store robbery raises a suspicion that he *may* have been involved in the earlier Skyline Farms Market robbery. (See *infra*, pt. II.A.3.c.) However, evidence which "merely casts a grave suspicion upon the accused" is not sufficient. (*People v. Shaw* (1941) 17 Cal.2d 778, 804 (*Shaw*).)

Although the prosecution presented evidence of a telephone call between Rouse and Montgomery on February 11, the day before the Skyline Farms Market robbery, the call does not suggest that the men were planning a robbery for the following day. Rather, when Rouse stated that the "gig" was "still a go," Montgomery replied that he would be there in a minute. This call suggests the men had something planned for that evening. On February 12, a masked man and a man wearing a hooded jacket robbed Skyline Farms Market. At one point, Makou identified Henderson as the robber wearing the hooded jacket with 90 percent certainty. Makou also testified that the man wearing the mask had the gun. Thereafter, analysis of some DNA found on the gun in the duffle bag after the aborted Eastridge Liquor Store robbery excluded Montgomery as a possible contributor. Although Rouse and Wright spoke several times on February 12, there is no clear indication in the calls that the men were discussing a successful robbery versus dividing the proceeds from drug sales. Even if the jury could infer that the men had discussed a successful robbery, there is nothing in these calls connecting Montgomery to the Skyline Farms Market robbery. (*People v. Falconer, supra,* 201 Cal.App.3d at p. 1543 ["[t]he evidence must connect the defendant with the crime, not simply with its perpetrators"].)

Other than Wright's testimony and "grave suspicion" that Montgomery may have been involved with the Skyline Farms Market robbery (*Shaw, supra,* 17 Cal.2d at p. 804), we are left with mere speculation that Montgomery was one of the robbers. At oral argument the Attorney General claimed that no corroboration was needed to connect Montgomery to the robbery. This contention is meritless. The argument directly contradicts section 1111 (*supra*, part II.A.1) and what the Attorney General said in his

own brief: "To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence' that 'tends to connect the defendant with the crime charged.' [Citation.]"

Because the evidence is insufficient to show that Montgomery was one of the robbers of Skyline Farms Market or that he participated in the conspiracy to commit the robbery, his convictions on counts 3 and 4 must be reversed.

3. Eastridge Liquor Store (Counts 5, 6, 7)

a. Evidence

At trial, Wright testified that after the Skyline Farms Market robbery he and Rouse discussed using Henderson and Montgomery on February 16 to rob a liquor store near Dale Street in La Mesa. Wright explained that he had given Henderson the black and red sports bag in preparation for the La Mesa robbery. On the date of the robbery, Wright drove a black Impala to pick up Henderson, the bag, and Montgomery. Wright planned to drive to La Mesa, contact Rouse, and then pinpoint where to meet.

As Wright drove, Montgomery spoke to Rouse on the phone as the men tried to locate each other. Wright parked the car carrying Montgomery and Henderson about 100 yards away from the store on Dale Street, and waited for Rouse to find them. Once Rouse pulled in behind Wright's car, the men had a quick meeting about what would happen. Henderson and Montgomery took the bag containing the robbery kit and left in Rouse's Cadillac, while Rouse left with Wright in the Impala. Wright intended to monitor the robbery from a distance while Montgomery and Henderson parked somewhere close to the store to make a quick get away after the robbery.

Shortly thereafter, Wright and Rouse saw a red station wagon that had its high beams on, which made the men uncomfortable. Montgomery then contacted Rouse by phone and expressed his concern about the station wagon. At that time the Cadillac was still in Wright's view. Rouse told Montgomery to leave the scene. Wright and Rouse left as well. Wright explained that Montgomery wanted to "ditch" the car because it contained the robbery kit.

The police arrested Wright and Rouse, but released Wright from custody based on a lack of evidence. Wright later met with Montgomery and learned that after the Cadillac had turned a corner, Montgomery had gotten out and ran. Had the four men not been spooked by the station wagon, Wright believed that Montgomery and Henderson would have parked the Cadillac in the parking lot of the store, entered the store, and proceeded with the robbery.

The prosecution corroborated Wright's testimony with telephone calls recorded the day of the robbery, and Agent Houska's testimony about the calls. Agent Houska testified that while monitoring Rouse's telephone line on February 16, the task force intercepted conversations that made him believe a robbery would occur that day. Specifically, Rouse told Wright that he had a "new vessel for the gig," that "it's going down," and that his "Lil Dude" had been in contact. Agent Houska opined that "vessel" meant a car, and that "gig" meant a robbery. About six hours later, Rouse was recorded telling Wright that he had "two" and they would get "active" in an hour or two. Rouse also stated that he had the "vessel" and was ready. Later in the conversation Rouse mentioned "the liquor store" and told Wright to "find your dude." Agent Houska initially

believed that the men planned to rob an individual. Not knowing Rouse's location, Agent Houska sent out surveillance units to areas that Rouse frequented and to some liquor stores.

About an hour later, the task force recorded a series of telephone conversations involving Rouse, Wright and Montgomery. Wright asked Rouse whether he was going to "call dude," and to get him and "his boy" ready. Rouse replied that he had been "chirpin" him, but that he was not answering. Wright stated that he did not have "his boy," but was waiting for a "hit" and would then "get him." Agent Houska explained that "chirpin" meant using the "direct connect feature" on some telephones that makes a chirping sound.

When Rouse finally reached Montgomery, he complained that he had been "chirping" Montgomery to tell him that "it's about that time." Wright asked Rouse if he was "ready" and whether he "has [his] little dude." Rouse responded that "they wuz on deck." Wright replied that he "jes got my dude too" and that they needed to meet in the area. Rouse told Montgomery that he was going to meet "you all out there."

When Wright told Rouse that he was "en route," Rouse responded that he was "already damn near out there." Montgomery then told Rouse that he was near the "back street of [the] store," but Rouse warned him that there were "babbies" or police down the street. The next five calls involved an attempt by Rouse in one car to locate Wright, Henderson and Montgomery in another car. In one call Rouse told Montgomery that he was on "Dale and Normal" and "it's duh gig." Agent Houska testified that surveillance units had located Rouse near those streets in La Mesa, but were still searching for Wright, Henderson and Montgomery.

Ultimately, the men located each other because the telephone calls stopped for about five minutes. At that time, surveillance units reported that a Cadillac driven by Rouse and an Impala driven by Wright had met and were side by side.

Thereafter, Rouse and Montgomery called each other six times. Montgomery complained that a station wagon was "watching [them]." Rouse told Montgomery to "wait them out." About 30 seconds later, Montgomery told Rouse to pick them up and that he was about to "ditch this mother fucker" because he had "all this shit in the car." Rouse told him not to ditch the car and that the "vessel [was] cool." After hearing these conversations, Agent Houska directed uniformed officers to stop both cars because he believed that the men were in the midst of committing a robbery.

Montgomery admitted that on February 16 he had been with Henderson, Rouse and Wright, but explained that the men were going to do "some drug things" in La Mesa. Montgomery testified that the taped telephone conversations pertained to a location for selling drugs, and that he had rock cocaine on his person to sell that night. Montgomery stated that when Rouse and Wright left, they were supposed to come back to tell him and Henderson where to sell the drugs. Montgomery claimed that he saw the sports bag containing the robbery kit for the first time when he got inside the Cadillac.

Montgomery called Rouse after seeing a car that concerned him. Montgomery explained that he had drugs on his lap and believed that the people in the car might call the police. In the call where he told Rouse that he was going to ditch the Cadillac because it had "shit" in it, he was referring to the "dope and that's when I seen the bag full of guns and stuff." Montgomery left the area as Rouse had instructed, parked the car and

walked away, leaving the bag in the Cadillac. Montgomery claimed that the police had completely misinterpreted what the men had planned.

b. Conspiracy to Rob (Count 5)

Montgomery generally contends that the evidence does not prove the conspiracy count because no reasonable juror would believe Wright's testimony, and Agent Houska misunderstood the plans what he, Henderson, Rouse and Wright discussed during the recorded telephone conversations. We are not persuaded.

Wright's testimony established the existence of a conspiracy to rob Eastridge Liquor Store. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1135.) Independent evidence amply corroborated Wright's testimony regarding Montgomery's connection to the conspiracy. (*People v. Price* (1991) 1 Cal.4th 324, 444 [corroboration of accomplice testimony is needed to connect the defendant to the conspiracy].)

Montgomery, Henderson, Wright and Rouse were all part of the same gang, and gang members can increase their ranking by committing robberies for the gang. In the telephone conversations recorded the day of the attempted robbery, Rouse told Wright that he had a "new vessel for the gig," that "it's going down," and mentioned "the liquor store" telling Wright to "find your dude." Wright later told Rouse that they needed to meet in "the area."

A surveillance unit located Rouse, followed his Cadillac to Dale Street in La Mesa, and observed him meet Wright, who was driving a black Impala. Montgomery admitted at trial that Wright had picked him up in a black Impala, and that Henderson was in the car. The meeting took place about a block from Eastridge Liquor Store. The

surveillance unit later observed Wright and Rouse leave together in the Impala. Surveillance units then stopped the Impala containing Rouse and Wright, and located the abandoned Cadillac. Montgomery admitted his participation in the activities discussed in the recorded telephone calls, but claimed that the men had met to sell drugs. The jury, however, could reasonably have rejected Montgomery's assertion based on the discussion about the liquor store, the proximity of the men to Eastridge Liquor Store, and the existence of the duffle bag in the Cadillac containing Wright's guns and other items useful in carrying out a robbery.

This evidence also shows that Montgomery committed several overt acts toward the commission of the robbery, including meeting Wright and Rouse near Eastridge Liquor Store, and driving the Cadillac containing the robbery kit. The commission of these overt acts constitutes circumstantial evidence of the existence of the conspiracy between the four men and its purpose and intent. (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1464.) The totality of the evidence provided more than sufficient evidence of an agreement among Montgomery and his companions to rob Eastridge Liquor Store.

c. Attempted Robbery (Count 6)

Montgomery contends that his conviction for attempting to rob a John Doe victim inside Eastridge Liquor Store must be reversed because he never entered the store. We disagree.

"An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission. [Citations.]" (*People*

v. Medina (2007) 41 Cal.4th 685, 694.) Since intent is inherently difficult to prove by direct evidence, it may properly be inferred from "'the act itself, together with its surrounding circumstances . . . .'" (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099, quoting *People v. Proctor* (1959) 169 Cal.App.2d 269, 279.) When the intent to commit the crime is clearly shown, an act done toward the commission of the crime may be sufficient for an attempt even though that same act would be insufficient if the intent is not as clearly shown. (*People v. Bonner* (2000) 80 Cal.App.4th 759, 764 (*Bonner*).) "[T]he plainer the intent to commit the offense, the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement. [Citations.]" (*People v. Dillon* (1983) 34 Cal.3d 441, 455 (*Dillon*).)

"Whether acts done in contemplation of the commission of a crime are merely preparatory or whether they are instead sufficiently close to the consummation of the crime is a question of degree and depends upon the facts and circumstances of a particular case. [Citations.]" (*People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 14.) "[T]o constitute an attempt[,] the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances. [Citations.]" (*People v. Memro* (1985) 38 Cal.3d 658, 698, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181.) "'[T]here must be . . . such progress that [the crime] will be consummated unless interrupted by circumstances independent of the will of the attempter. . . .' [Citations.]" (*Dillon, supra,* 34 Cal.3d at p. 454.) "[W]hen the acts are such that any rational person would believe a

crime is about to be consummated absent an intervening force, the attempt is underway . . . ." (*Id.* at p. 455.)

Here, Montgomery drove with Wright and Henderson to a location in La Mesa near Eastridge Liquor Store. Montgomery and Henderson then took the Cadillac, which contained the robbery kit. These acts, together with the recorded telephone calls, show the clear intent to commit a robbery. This evidence, combined with Wright and Rouse's conversation regarding "the liquor store," the need to meet in the area, and the proximity of Eastridge Liquor Store to the location where the men met, strongly suggest the men intended that Montgomery and Henderson rob Eastridge Liquor Store.

As Agent Houska listened to the telephone calls, he believed a robbery was imminent, and that he needed to stop the men for safety reasons. It was only after Montgomery got spooked by cars in the area and Rouse told him to "get somewhere," that Montgomery abandoned the robbery. The totality of the evidence shows acts by Montgomery beyond mere preparation that, if not derailed by his belief that he was being watched, would have resulted in the robbery of Eastridge Liquor Store. As our high court has noted, "[i]n a variety of contexts convictions of attempt have been upheld even though the defendant did not actually go onto the premises where the crime was to be committed. [Citations.]" (*Dillon*, *supra*, 34 Cal.3d at p. 456, fn. 4.) Additionally, that Montgomery never confronted the clerk inside Eastridge Liquor Store is not determinative. Where, as here, an attempted robbery was interrupted before the robber was in the presence of a victim, a single count of attempted robbery is proper. (*Bonner*, *supra*, 80 Cal.App.4th at pp. 764-765.)

d. Possession of a Firearm by a Felon (Count 7)

The jury found Montgomery guilty of being a felon in possession of a firearm in conjunction with the attempted robbery of Eastridge Liquor Store on February 16. He contends the evidence does not prove that he possessed a firearm. We disagree as the jury could reasonably conclude that Montgomery and Henderson had joint dominion and control over the bag in the Cadillac that contained the guns.

The elements of the offense of being an ex-felon in possession of a firearm are conviction of a felony and the knowing ownership, possession, custody or control of a firearm. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) "Constructive possession exists where a defendant maintains some control or right to control [the item] that is in the actual possession of another." (*People v. Morante* (1999) 20 Cal.4th 403, 417.) Exclusive possession of the item, or the place where it is found, is not necessary to show dominion and control. (*People v. Rushing* (1989) 209 Cal.App.3d 618, 622.) Dominion and control may be shown by circumstantial evidence and any reasonable inferences to be drawn therefrom. (*Id.* at pp. 621-622; *People v. Williams* (1971) 5 Cal.3d 211, 215, superseded by statute on another issue as stated in *People v. Romero* (1997) 55 Cal.App.4th 147, 152-153.)

In a recorded telephone call Montgomery told Rouse to pick them up, and that he was about to "ditch this mother fucker" because he had "all this shit in the car." Wright testified that Montgomery wanted to ditch the car because it contained the duffle bag with the guns. Montgomery similarly testified that the "shit" he had referred to was "dope"

and "the bag full of guns and stuff." The guns were in the duffle bag in the front seat of the Cadillac, clearly within Montgomery's immediate reach and control.

The trial court instructed the jury that:

> "Two or more people may possess something at the same time. A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it either personally or through another person." (CALCRIM No. 2511.)

Here, the jury could reasonably infer that the men were planning to rob Eastridge Liquor Store, that Montgomery had a right to control the guns, and thus had possession of the guns.

B. Juvenile Adjudications

1. Sentence Enhancement

Montgomery contends that because juveniles are not entitled to a jury trial, the trial court's use of his prior juvenile court adjudications to increase his sentence beyond the statutory maximum violated his rights to a trial by jury and due process of law. As Montgomery concedes, this issue was resolved against him by the California Supreme Court in *People v. Nguyen* (2009) 46 Cal.4th 1007, holding that a juvenile adjudication can be used to increase a sentence under the three strikes law. (*Id*. at pp. 1010, 1019, 1028.) We are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, there was no error.

2. *Romero* Motion

Montgomery asserts the trial court abused its discretion by refusing to strike his prior serious and violent felony convictions under *Romeo* based on his youth and the existence of mitigating factors. (*Romero, supra*, 13 Cal.4th 497.) We disagree.

In imposing sentence under the three strikes law, the trial court has discretion to strike one or more of the defendant's prior violent or serious felony convictions in the interest of justice. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th 497.) In exercising its discretion, the trial court must consider whether, in light of the nature and circumstances of his present felonies and prior serious or violent felony convictions, and the particulars of his background, character, and prospects, the defendant is outside the spirit of the three strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) A court's refusal or failure to strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) A trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it. (*Id*. at p. 377.) "[T]he circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the . . . scheme . . . .'" (*Id*. at p. 378, quoting *People v. Strong* (2001) 328, 338.)

Montgomery's past criminal history includes a true finding for taking a vehicle without permission at age 15. He received his first strike prior for robbery at age 16. During this crime Montgomery chased and beat the victim after the victim threw his money over a fence. Later that year, Montgomery received his second strike prior after he and a cohort robbed a business at gunpoint. During this crime Montgomery struck the

victim on the head with the gun. The following year, Montgomery was arrested for auto theft, and received his first adult conviction for possessing a firearm.

At the start of the hearing, the court indicated its tentative decision to deny the request, but allowed counsel to argue the matter. After hearing the arguments of counsel, the trial court remarked that "this is the kind of case that the three strikes law was designed to target." While the court acknowledged Montgomery's youth, it stated that Montgomery had "packed a lot of violent crime in a short period of time."

Given Montgomery's criminal history and his persistent inability to conform his conduct to the requirements of the law, Montgomery fell well within the spirit of the three strikes law. Montgomery has not shown that the trial court's denial of his request to strike a prior conviction was arbitrary or irrational. The court did not abuse its discretion in denying Montgomery's request to strike.

DISPOSITION

Henderson's judgment is affirmed. Montgomery's convictions on counts three and four are reversed, and his sentence on those counts is stricken. In all other respects Montgomery's judgment is affirmed. The clerk of the superior court is

directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

McINTYRE, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.